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State Bar #009508
Attorney for Defendant
Joseph Douglas Roberts

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF APACHE

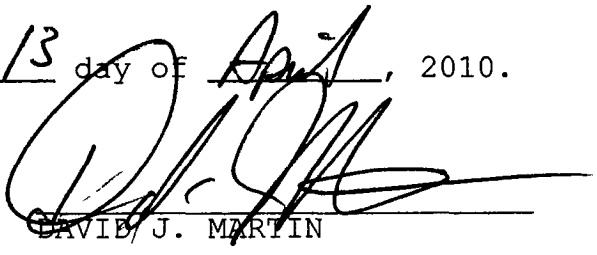
STATE OF ARIZONA,) No.CR2010-047
)
Plaintiff,) MOTION FOR REVIEW OF
) PRELIMINARY HEARING
vs.)
) Assigned:
JOSEPH DOUGLAS ROBERTS,) Honorable Donna J. Grimsley
)
Defendant(s).)

COMES NOW Defendant, by and through the undersigned attorney, and pursuant to the provisions of Rule 5.5 of the Arizona Rules of Criminal Procedure, hereby moves this Court to review and then remand for a new finding of probable cause before the Justice of the Peace the determination of probable cause made on March 19, 2010 regarding the charges contained within the Information herein on the grounds and for the reasons that the Defendant was denied a substantial procedural right and no credible evidence of guilt was adduced.

This Motion is based upon the record herein, specifically the record of the preliminary hearing commenced on February 5th, and continued over to March 19th, the following Memorandum of Points and Authorities, and any evidence and argument of counsel that may be adduced at the hearing to be held herein.

/ / /

1 RESPECTFULLY SUBMITTED this 13 day of April, 2010.

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4 
DAVID J. MARTIN

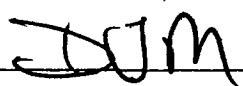
5 Original of the foregoing delivered
6 the 13th day of April, 2010 to:

7 Clerk
8 Apache County Superior Court
9 70 West 3rd South
10 PO Box 365
11 St. Johns, AZ 85936

12 Copy of the foregoing mailed and faxed
13 the 14th day of April, 2010 to:

14 Hon. Donna J. Grimsley
15 Apache County Superior Court
16 PO Box 365
17 St. Johns, AZ 85936
18 (928) 337-7555
19 **FAX: 928-337-7586**

20 Michael Whiting, Esq.
21 Apache County Attorney
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26 Via Facsimile 928/337-2427

27 By 

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Review of a preliminary hearing is based upon the grounds of
3 denial of a substantial procedural right or the absence of
4 credible evidence of guilt adduced. Rule 5.5(a), Arizona Rules
5 of Criminal Procedure. Evidence review is limited to the
6 certified transcript of the proceedings. Id. at (c).
7 Transcripts of the preliminary hearing commencing on February 5,
8 2010, reconvening and concluding on March 19, 2010 are part of
9 the record herein and incorporated herein by this reference as if
10 fully set forth.

11 A defendant is entitled to due process during a probable
12 cause determination. Crimmins v. Superior Court in and for
13 Maricopa County, 137 Ariz. 39, 41, 668 P.2d 882 (1983).
14 (Defendant is entitled to due process during grand jury
15 proceedings.) (Citations omitted)

16 Defendant submits that Defendant was denied substantial
17 procedural rights contained within those rights afforded to him
18 by notions of fairness contained within the due process
19 provisions of the State and Federal Constitutions and that there
20 was no credible evidence of guilt adduced with respect to the
21 following charges.

22 Count One of the Amended Complaint accuses the Defendant of
23 first degree murder and in essence alleges both first degree
24 murder in violation of A.R.S. 13-1105(A)(1), "and/or" alleges
25 felony murder in violation of A.R.S. 13-1105(A)(2). Aside from
26 being a duplicitous charge (the subject of separate, independent
27 Motion to Dismiss by the defense), there is absolutely no
28

1 credible evidence of the Defendant's guilt of the commission of
2 the element of premeditation to kill the alleged victim.

3 Premeditation is defined at A.R.S. 13-1101(1). The Arizona
4 Supreme Court has instructed that:

5 "'Premeditation' means that the defendant intended to kill
6 another human being [knew he/she would kill another human
7 being], and that after forming that intent [knowledge],
8 reflected on the decision before killing. It is this
reflection, regardless of the length of time in which it
occurs, that distinguishes first degree murder from second
degree murder. . . .

9 State v. Thompson, 204 Ariz. 479, ¶32, 55 P.3d 420 (2003). The
10 mental state of premeditation is distinct from the mental state
11 required for intentional or knowing second degree murder. State
12 v. Walton, 133 Ariz. 282, 650 P.2d 1264 (App. 1982).

13 In addition, the evidence that was actually presented
14 suggested that there was no basis upon which there could be a
15 conclusion that the Defendant allegedly acted with premeditation
16 as the State presented evidence that the Defendant said his eyes
17 were closed when he allegedly said he pulled the trigger, R.T. of
18 preliminary hearing, 03/19/10, P. 24, L. 22; that the Defendant
19 was not asked whether he had killed McCarragher, nor asked if he
20 intended to kill McCarragher, nor asked if he knew whether his
21 conduct would cause the death of McCarragher, nor asked where he
22 shot into the room. Id. at P. 25, L. 7-21.

23 The duplicitous charge of felony murder alleging the
24 violation of A.R.S. 13-1105(A)(2) alleges the predicate felonies
25 of burglary allegedly in violation of A.R.S. 13-1507 or 13-1508,
26 as well as the further duplicitous allegation of robbery under
27 A.R.S. 13-1902, 13-1903, or 13-1904. No credible evidence of
28 guilt was presented of the required element that the alleged

1 burglary and/or robbery was committed in the course and in the
2 furtherance of the burglary and/or robbery or immediate flight
3 from those alleged offenses. The State presented no evidence
4 that the death of William Stone was the result of action taken to
5 facilitate the accomplishment of burglary and/or felony. See,
6 State v. Arias, 131 Ariz. 441, 443, 641 P.2d 1285, 1287 (1982).
7 ". . . where the killing 'emanates' from the crime itself, and is
8 a natural and proximate result thereof, it is committed in
9 furtherance of the felony within the meaning of the statute.
10 State v. Lopez, 173 Ariz. 552, 555, 845 P.2d 478 (App. 1992),
11 citing, State v. Moore, 580 S.W.2d 747, 751 (Mo. 1979). The
12 State's witness testified in cross-examination that after William
13 Inmon shot McCarraghe, that allegedly they (Inmon and the
14 Defendant) "went inside the bedroom and ransacked it and they
15 stole two rifles from inside there." (Preliminary hearing
16 transcript of 03/19/10, P. 39, L. 23-25, P. 40, L. 1-2) On
17 redirect examination, the State's witness testified:

18 After - according to what Joseph Roberts told me, after
19 William McCarraghe had been shot by William Inmon, Inmon
20 crawled through the window and then let Joseph Roberts in
21 through the front door and then they ransacked or looked
22 around the belongings in the room for property and they
23 stole some items from inside there.

24 Thus, not only was the evidence lacking that a robbery and/or
25 burglary was committed "in the course of and in furtherance of
26 the offense or immediate flight from the offense," A.R.S.
27 13-1105(A) (2) but evidence just to the contrary was presented in
28 that the alleged burglary and robbery occurred after William
Inmon shot the alleged victim and the killing of McCarraghe did
not emanate from the burglary/robbery. Moreover, there was no

1 credible evidence of guilt regarding the elements of robbery as
2 set forth in A.R.S. 13-1902 in that the State presented no
3 evidence that the Defendant took any property from the victim or
4 his immediate presence against his will and threatened or used
5 force against the alleged victim with the intent to either coerce
6 surrender the property or to prevent resistance of the victim.
7 See, A.R.S. 13-1902. Simply put, on the record of the evidence
8 presented by the State, the taking of property occurred after the
9 alleged victim had been shot and thus there was no threat or use
10 of force with the intent to coerce the surrender of the property
11 or to prevent the victim's resistance. In fact, there was no
12 credible evidence adduced at the preliminary hearing that either
13 the Defendant or Mr. Inmon went to the alleged victim's residence
14 to commit an act of burglary and/or robbery.

15 The finding of probable cause by the Justice of the Peace on
16 Count One constitutes a denial of a substantial procedural right
17 and such a finding was not based upon credible evidence of guilt
18 as demonstrated by the lack of evidence of the elements of each
19 of the allegations contained in Count One as set forth above.

20 Count Two of the Amended Complaint alleged conspiracy to
21 commit first degree murder in violation of A.R.S. 13-1003 and
22 13-1105(A)(1). Inexplicably, the State has also cited to A.R.S.
23 13-1814(A) (theft); 13-2809(A)(1) (tampering); 13-2512(A)
24 (hindering); 32-1364(A) (mutilating a dead body); 13-2926(A)
25 (concealing a dead body); and 13-2809(A)(1) (tampering with
26 physical evidence). In the first instance, the State failed to
27 present any credible evidence of both that the Defendant had an
28 intent to promote or aid the commission of first degree murder

1 and that he agreed with Inmon that the offense would be
2 committed. See, State v. Willoughby, 181 Ariz. 530, 545, 892
3 P.2d 1319 (1995); see also, State v. Arrredondo, 155 Ariz. 314,
4 317, 746 P.2d 484 (1987). While it is acknowledged that the
5 State's witness testified that according to Mr. Inmon, "They met
6 and put a plan together," (preliminary hearing transcript of
7 02/05/10, P. 22, L. 5), there is no credible evidence adduced
8 that they agreed upon the killing of the alleged victim, nor that
9 the Defendant engaged in words or acts from which it may be
10 inferred that he intended to promote or aid in the crime of first
11 degree murder of the alleged victim. It should further be
12 observed that Arizona law does not recognize the possibility of a
13 conviction of conspiracy to commit first degree murder when that
14 conviction is based only on the commission of felony murder.
15 Evanchyk v. Stewart, 202 Ariz. 476, 481, ¶18, 47 P.3d 1114
16 (2002).

17 In addition, for whatever reasons, the State may have added
18 the other substantive criminal offense citations to Count Two of
19 the Amended Complaint, there is absolutely no proof of any
20 agreement that any of those offenses would be committed and that
21 it was a specific intent of the Defendant to commit those
22 offenses. See, Willoughby, supra. and A.R.S. 13-1003.

23 A determination of probable cause by the Justice of the
24 Peace on Count Two, conspiracy, denied the Defendant of a
25 substantial procedural right and was not based upon any credible
26 evidence of guilt.

27 Count Three of the Amended Complaint charged the Defendant
28 with theft of means of transportation citing to A.R.S.

1 13-1814(A). Unfortunately the State failed to cite to one of the
2 five subsections contained within A.R.S. 13-1814(A) each of which
3 provides for a distinct means of committing the crime of theft of
4 means of transportation thus depriving the Defendant, as well as
5 the Court of a meaningful basis upon which to efficiently
6 evaluate the review of the probable cause determination. In any
7 event, the State presented no credible evidence that the
8 Defendant controlled the 1964 Chevrolet Corvette with the intent
9 to deprive Mr. Achten of it, see, A.R.S. 13-1814(A)(1), nor that
10 he controlled the 1964 Chevrolet Corvette knowing or having
11 reason to know that it was stolen. See, A.R.S. 13-1814(A)(5).
12 The State's witness could not remember whether the Defendant
13 stated how he believed Mr. Inmon got the vehicle (R.T. of
14 preliminary hearing, 03/19/10, P. 18, L. 3-5), nor did the
15 State's witness recall asking the Defendant of the circumstances
16 under which he received the car from Inmon (Id. at P. 26, L. 12-
17 14), nor did the State's witness ask the Defendant if he knew who
18 the owner of the vehicle was (Id. at L. 15-17), nor did the
19 State's witness ask the Defendant if he knew whether the car had
20 been stolen. (Id. at L. 18-20) The state of the record fails to
21 produce any credible evidence of guilt of the possible elements
22 of theft of means of transportation and a finding of probable
23 cause in that determination was a denial of a substantial
24 procedural right.

25 With respect to Count Four, the Amended Complaint charged
26 the Defendant with mutilating a dead body in violation of A.R.S.
27 32-1364(A) and cited the accomplice liability statutes, A.R.S.
28 13-301 and 13-303. A.R.S. 32-1364(A) provides in pertinent part

1 that it is unlawful for a person to mutilate a dead human body.
2 The term "mutilate" does not appear to be defined within Title
3 32, Article 1, specifically not within A.R.S. 32-1301 entitled
4 "Definitions". Therefore, resort to the commonly understood
5 meaning of the word "mutilate" is appropriate. According to the
6 *American Heritage Dictionary*, 2nd Edition (1982), the word
7 "mutilate" is defined as follows:

8 (1) To cut off or destroy a limb or other essential part.

9 (2) To render imperfect by excising or radically altering a
10 part.

11 There was no credible evidence adduced at the preliminary hearing
12 that the Defendant cut off or destroyed a limb or other essential
13 part of Mr. Achten or that he rendered imperfect by excising or
14 radically altering a part of Mr. Achten's body. In addition,
15 there was no credible evidence adduced to establish any facts to
16 support the finding of probable cause that the Defendant
17 solicited or commanded another to mutilate Mr. Achten's body or
18 aided counsel, or agreed to aid, or attempted to aid another in
19 the planning or committing of mutilating Mr. Achten's body, nor
20 that the Defendant provided the means or opportunity to another
21 person to mutilate Mr. Achten's body all as defined within the
22 commonly understood dictionary definition of mutilate. Thus,
23 there was no proof of accomplice liability as defined at A.R.S.
24 13-301.

25 With respect to Count Five of the Amended Complaint, the
26 State charged the Defendant with concealment of a dead body in
27 violation of A.R.S. 13-2926(A) (1) and cited the accomplice
28 liability statutes, A.R.S. 13-301 and 13-303. A.R.S. 13-2926

1 makes it unlawful for a person to knowingly move a dead human
2 body or parts of a human body with the intent to abandon or
3 conceal the dead human body or parts. Id. (emphasis added) While
4 the State presented some evidence, though not of a credible
5 nature inasmuch as it related to words of Mr. Inmon, (a point
6 addressed below relative to the Defendant's denial of a
7 substantial procedural right) that Mr. Inmon allegedly claimed
8 that he contacted the Defendant to assist him (Inmon) in
9 "disposing" of Mr. Achten's body (R.T. of preliminary hearing,
10 02/05/10, P. 28, L. 9-13), and that Inmon needed some help (Id.
11 at L. 17-18), and that Inmon claimed the Defendant assisted in
12 digging a hole into which Mr. Achten's body was allegely placed
13 and burned (Id. at P. 29), and that the Defendant allegedly
14 stated that he helped Inmon attach a tow strap to Mr. Achten's
15 body and then Mr. Inmon got in the Corvette and drug the body out
16 of the house (R.T. of preliminary heaing, 03/19/10), P. 35, L.
17 20-23), the State's witness testified that he did not ask the
18 Defendant what he was intending to do at the Achten residence or
19 words to that effect. (Id. at P. 36) Thus, there was no credible
20 evidence presented of an intent to "abandon or conceal".
21 Defendant was denied a substantial procedural right and there was
22 no credible evidence of guilt of the element of intent to abandon
23 or conceal by the finding of the Justice of the Peace of probable
24 cause for Count Five.

25 With respect to Count Six, the Amended Complaint charged the
26 Defendant with tampering with physical evidence in violation of
27 A.R.S. 13-2809(A)(1) and cited the accomplice liability statutes,
28 A.R.S. 13-301 and 13-303. Tampering with physical evidence

requires proof that a person tampered with physical evidence with the intent that the physical evidence be used, introduced, rejected, or unavailable in an official procedure which has been pending or which the person knows is about to be instituted by destroying, mutilating, altering, concealing, or removing physical evidence with the intent to impair its verity or availability. A.R.S. 13-2809(A)(1). There was no credible evidence of guilt of the elements of the Defendant's intent that the body of Mr. Achten was tampered with with the intent to make the body unavailable in an official proceeding which has been pending or which the Defendant knew was about to be instituted. See, A.R.S. 13-2809(A). Moreover, there was no credible evidence adduced of the element that requires proof of evidence of the Defendant's intent to impair the "verity" or "availability" of Mr. Achten's body relative to an official proceeding which has been pending or which the Defendant knew was about to be instituted.

In Counts Seven, Eight, Nine, Ten, and Eleven, the State accused the Defendant of the class three felony of hindering prosecution in violation of A.R.S. 13-2512, except that Count Nine failed to cite A.R.S. 13-2512 but cited only to A.R.S. 13-2510(A) which is the statutory definition of rendering assistance. In a similar fashion, A.R.S. 13-2510 was not cited in Counts Seven, Eight, Ten, and Eleven. These collective failures denied the Defendant of a substantial procedural right to have the due process requirements of being advised of the charge of which he was accused during the probable cause determination.

1 With respect to Count Seven, there was no credible evidence
2 adduced of any evidence of guilt of the Defendant's rendering of
3 assistance to Mr. Inmon within the meaning of A.R.S. 13-2510 with
4 the intent to hinder Mr. Inmon's apprehension, prosecution,
5 conviction, or punishment for the first degree murder of William
6 McCarraghe as alleged.

7 With respect to Count Eight, there was no credible evidence
8 adduced that the Defendant rendered assistance to James Dandridge
9 within the meaning of A.R.S. 13-2510 with the intent to hinder
10 Mr. Dandridge's apprehension, prosecution, conviction, or
11 punishment for the offense of first degree murder of William
12 McCarraghe as alleged.

13 With respect to Count Nine, there was no credible evidence
14 adduced of the Defendant's intent to hinder the apprehension,
15 prosecution, conviction, or punishment of Mr. Inmon for the
16 murder of Daniel Achten.

17 With respect to Count Ten, there was no credible evidence
18 adduced of the Defendant's rendering of assistance to William
19 Inmon with the intent to hinder the apprehension, prosecution,
20 conviction, or punishment of Mr. Inmon for the crimes of felony
21 burglary and/or robbery between April 27, 2007 and August 28,
22 2009, presumably relating the alleged victimization of William
23 McCarraghe.

24 With respect to Count Eleven, there was no credible evidence
25 adduced of the Defendant's rendering of assistance within the
26 meaning of A.R.S. 13-2510 with the intent to hinder the
27 apprehension, prosecution, conviction, or punishment of James
28 Edward Dandridge for the felony offenses of burglary and/or

1 robbery between April 27, 2007 and August 28, 2009, presumably
2 relating the alleged victimization of William McCarraghe.

3 Therefore, the finding of probable cause for Counts Seven through
4 Eleven was the result of a deprivation of substantial procedural
5 right and not based upon any credible evidence of the Defendant's
6 guilt.

7 The Defendant was also denied a substantial procedural right
8 by the failure of the Justice of the Peace to grant the
9 Defendant's Motion to Dismiss which is incorporated herein by
10 this reference. In that Motion to Dismiss, the Defendant
11 requested that the Court set the matter for a hearing and to
12 necessarily hear evidence at that hearing and then follow the
13 directions found in State v. Warner, 150 Ariz. 123, 722 P.2d 291,
14 regarding the need to make separate and detailed findings
15 regarding the State's interference with the Defendant's
16 relationship with his attorney. Id. at 129. Despite the lack of
17 any response in opposition by the State, the Justice of the Peace
18 ruled that the motion was premature and could not be ruled upon
19 at the time, thus, effectively denying the Defendant of the
20 important state and federal constitutional guarantees of the
21 effective assistance of counsel due to the improper interference
22 of the confidential attorney-client relationship perpetrated upon
23 the Defendant by County Attorney Whiting and Deputy County
24 Attorney Brannan both of whom expressly authorized investigator
25 Hounsell to go to the Defendant while he was incarcerated in the
26 Apache County Jail and speak to him on the day before the
27 commencement of the preliminary hearing about a tendered plea
28 agreement and the waiver of a preliminary hearing at a time when

1 all involved knew that the Defendant had counsel, that counsel
2 would not be present when Hounsell went to the Defendant, nor
3 would counsel be contacted to be informed of the intended contact
4 which consisted of Hounsell informing the Defendant that if the
5 preliminary hearing was not waived by the Defendant, the death
6 penalty could be sought, the Defendant very possibly could get
7 more than Mr. Inmon got which was contemplated to be seventy-five
8 years, and that Defendant's wife would be prosecuted for
9 hindering prosecution if the Defendant did not waive the
10 preliminary hearing. See, R.T. of preliminary hearing, 02/05/10,
11 P. 35-49. Hounsell testified on February 5, 2010 in the presence
12 of the Defendant that somebody had said that defense counsel,
13 referring to the undersigned, thought that the Defendant should
14 waive his preliminary hearing (a false proposition). (Id. at P.
15 40, L. 7-9; L. 23-25) Hounsell testified that he felt sorry for
16 the Defendant and that the Defendant wasn't given all of the
17 information on the deal the State had offered with the evidence
18 it had (again a false proposition). (Id. at P. 45, L. 3-5)
19 Hounsell testified that defense counsel undersigned wanted to
20 waive the preliminary hearing but the Defendant did not (yet
21 again a false proposition). (Id. at P. 46, L. 8-10) While the
22 Defendant will not restate each and every aspect of the unopposed
23 Motion to Dismiss, it having been incorporated herein by its
24 reference as if fully stated, the defense pointed out both in the
25 Motion to Dismiss and during the hearing that the Defendant's
26 procedural right to make a specific offer of proof, presumably
27 through his attorney, including the names of witnesses who would
28 testify or produce evidence offered was, as a result of the

1 State's intrusion into the attorney-client relationship that
2 existed prior to February 4, 2010 by its contact with the
3 Defendant without the consent or knowledge of defense counsel but
4 with the express permission of the County Attorney and Chief
5 Deputy by attributing numerous false propositions of defense
6 counsel, thoroughly undermined by the wrongful conduct of the
7 State's agents. By failing to grant the request to conduct a
8 hearing on the matter in order to preserve that important right
9 at the time of the preliminary hearing, the Defendant was denied
10 that substantial right by the Justice of the Peace's unwarranted
11 side-stepping of the issue claiming that it was premature. It
12 was not and the time to address it was then because by proceeding
13 with the preliminary hearing the Defendant was denied the right
14 to have a meaningful and confident relationship with defense
15 counsel to confer and formulate a meaningful offer of proof
16 because of the impact of the State's intrusion into the attorney-
17 client relationship.

18 The Defendant was further denied a substantial procedural
19 right when at the recommencement of the preliminary hearing on
20 February 5, 2010 the defense raised the fact that a bar complaint
21 had been filed with the Arizona State Bar, see Exhibits A and B
22 attached hereto and incorporated herein by this reference, and
23 R.T. of preliminary hearing of 02/05/10, P. 5, L. 21-24, alleging
24 that it would be a conflict of interest for the Apache County
25 Attorney's Office to continue the prosecution of the case. (Id.
26 at P. 7, L. 14-17) The Court responded by indicating it had not
27 been "apprised" of any information regarding a bar complaint
28 against Chief Deputy Brannan and County Attorney Whiting and

1 that, apparently, that issue needed to be raised in the Superior
2 Court, Id. at L. 6-13, apparently ignoring or failing to
3 appreciate the then existing impediment to the Defendant's right
4 to effective assistance of counsel relative to making an offer of
5 proof as allowed pursuant to Rule 5.3(A). The Defendant has,
6 inherent in the right to a preliminary hearing a right to due
7 process. See, Crimmons, supra. Defendant's due process rights
8 were violated by the Court's failure to take some action upon
9 being notified that a bar complaint arising out of the conduct of
10 the County Attorney and his Chief Deputy in authorizing direct
11 contact with the defendant, while represented in an attempt to
12 obtain a waiver of an important constitutional right. Their
13 conduct and the resulting bar complaint against them presented a
14 conflict of interest. The Defendant at the preliminary hearing
15 had a right to fundamental fairness as a matter of both
16 substantive and procedural due process. See, e.g., United States
17 v. Lilly, 983 F.2d 300, 309 (1st Cir. 1992) (A substantive due-
18 process violation "occurs when government conduct violates
19 'fundamental fairness' and is 'shocking to the universal sense of
20 justice.'"), quoting Kinsella v. United States, ex rel.
21 Singleton, 361 U.S. 234, 246, 80 Sup. Ct. 297, 4 L. Ed. 2d, 268
22 (1960); Marshall v. Jerico, Inc., 446 U.S. 238, 242, 100 Sup.
23 Ct. 1610, 56 L. Ed. 2d, 182 (1980) (The right to procedural due
24 process "entitles a person to an impartial and disinterested
25 tribunal in both civil and criminal cases, 'one that preserves
26 both the appearance and reality of fairness' generating the
27 feeling that is so important to a popular government, that
28 justice has been done."), quoting Joint Anti-Fascist Refugee

1 Committee v. McGrath, 341 U.S. 123, 172, 71 Sup. Ct. 624, 95 L.
2 Ed. 817 (1951). Arizona law is clear that certain prosecutorial
3 conflicts may rise to the level of due process concerns.
4 Villalpando v. Raegan, 211 Ariz. 305, 308, ¶8, 121 P.3d 1972
5 (App. 2005) (citations omitted). A court has authority to
6 disqualify a prosecutor or an entire office for a conflict of
7 interest. Id. In Villalpando, the Court of Appeals pointed out
8 that there is no bright line rule for determining whether a
9 conflict rises to the level of a due process violation", Id., and
10 suggested that each case must be examined individually. Id.
11 (Citing, Lassiter v. Department of Social Services, 452 U.S. 18,
12 24-25, 101 Sup. Ct. 2153, 68 L. Ed. 2d 640 (1981), quoting
13 Cafeteria Workers v. McElroy, 367 U.S. 886, 895, 81 Sup. Ct.
14 1743, 6 L. Ed. 2d 1230 (1961). The Court in Villalpando, after
15 cautioning that motions to disqualify an opposing party's
16 attorney based upon a conflict of interest or appearance of
17 impropriety should be viewed with suspicion, Id. at ¶10, citing
18 Gomez v. Superior Court, 149 Ariz. 223, 226, 717 P.2d 902, 905
19 (1986), stated:

20 Even so, a prosecutor's duty to avoid a conflict of interest
21 is prime because his paramount duty is to the principle of
22 'fairness'. In other words, his interest is not so much to
23 prevail as to ensure that 'justice shall be done'. Pool v.
Superior Court, (State), 139 Ariz. 98, 103, 677 P.2d 251,
266 (1984) (quoting Berger v. United States, 295 U.S. 78,
88, 55 Sup. Ct. 629, 79 L. Ed. 1314 (1935)).

24 Public confidence in the criminal justice system is
25 maintained by assuring that it operates in a fair and
26 impartial manner. This confidence is eroded when a
prosecutor has a conflict or a personal interest in a
criminal case which he is handling.

27 Id. at P. 309, ¶11 (Citations omitted).

28 Finally, the Court in Villalpando observed that:

1 Any interest that is inconsistent with the prosecutor's duty
2 to safeguard justice is a conflict that could potentially
3 violate the defendant's right to fundamental fairness. Id.
4 at ¶12.

5 The denial of the substantial procedural right that entitles
6 the Defendant to a redetermination of probable cause is founded
7 upon the fact that the Justice of the Peace did not address the
8 issue but simply attempted to side-step it but nonetheless made a
9 finding of probable cause on all counts when all the while, a bar
10 complaint was pending against the State and the Justice of the
11 Peace failed to take the proper steps to conduct an analysis of
12 the facts that existed at the time as instructed by the United
13 States Supreme Court in Lassiter, supra. This failure tended to
14 aggravate and compound the failure to conduct a hearing upon the
15 Motion to Dismiss and then subsequently rule upon it as argued
16 above. Alternatively, the Justice of the Peace could have
17 certified the question to the Superior Court for determination
18 before proceeding.

19 Defendant was also denied a substantial procedural right by
20 the failure of the Justice Court to rule upon the Defendant's
21 Motion for Removal of a Prisoner timely filed in the Justice
22 Court and incorporated herein by this reference as if fully set
23 forth. In the same Minute Entry as the one that refused to rule
24 upon the Motion to Dismiss, the Justice of the Peace ruled that
25 the Motion for Removal of a Prisoner requesting the presence of
26 William Inmon as a material witness on behalf on the Defendant
27 was premature and could not be ruled upon at that time, in effect
28 denying the motion.

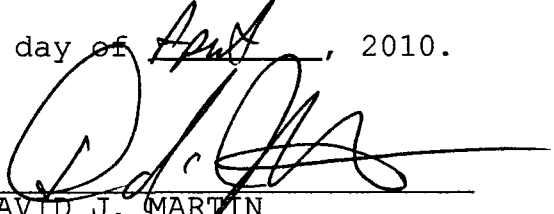
Rule 5.4(c) of the Arizona Rules of Criminal Procedure

1 require that a finding of probable cause be based upon
2 substantial evidence. Said evidence may be based in part or in
3 whole upon hearsay, Id., provided there is reasonable grounds to
4 believe that the declarant will be personally available for
5 trial. Rule 5.5(c)(3). The Defendant wished to have William
6 Inmon produced as a witness and to be removed from the jail to be
7 available for that preliminary hearing. The Justice of the Peace
8 had a mandatory duty to issue process to secure the attendance of
9 witnesses. Rule 5.2 of the Arizona Rules of Criminal Procedure.
10 When called upon to make an offer of proof, defense counsel
11 undersigned indicated that he wanted to call Mr. Inmon to the
12 stand to establish his unavailability for trial and to
13 demonstrate that the words attributed to Mr. Inmon during the
14 presentation of evidence at the preliminary hearing would not be
15 demonstrated at a trial. (R.T. of preliminary hearing, 03/19/10,
16 P. 41, L. 23-25, P. 42, L. 1-5) The offer of proof relied upon
17 two distinct theories. One was that Mr. Inmon's health may not
18 be such that he would be available for trial having been observed
19 by the Defendant to have been rolled out of the jail on a gurney
20 and secondly, that he might assert his right to remain silent and
21 not make any statements at trial. Denial of the Defendant's
22 request for the removal of a prisoner, combined with the denial
23 of the willingness to hear the offer of proof amounted to a
24 denial of a substantial procedural right that should have been
25 afforded to the Defendant.

26 In conclusion, Defendant submits that he was denied numerous
27 substantial procedural rights as outlined herein and that there
28 were numerous points as related to certain elements of each and

1 every count where there was no credible evidence of guilt adduced
2 but instead the Justice of the Peace, in a rush to transfer this
3 case to the Superior Court, ignored those failings without even
4 so much as giving the Defendant an opportunity to argue their
5 absence. See, R.T. of preliminary hearing, 02/05/10, P. 41, L.
6 7-20.

7 RESPECTFULLY SUBMITTED this 13 day of April, 2010.

8
9 
10 DAVID J. MARTIN

11 Original of the foregoing delivered
12 the 13th day of April, 2010 to:

13 Clerk
14 Apache County Superior Court
15 70 West 3rd South
16 PO Box 365
17 St. Johns, AZ 85936

18 Copy of the foregoing mailed and faxed
19 the 14th day of April, 2010 to:

20 Hon. Donna J. Grimsley
21 Apache County Superior Court
22 PO Box 365
23 St. Johns, AZ 85936
24 (928) 337-7555
25 **FAX: 928-337-7586**

26 Michael Whiting, Esq.
27 Apache County Attorney
28 Martin Brannan, Esq.
Deputy County Attorney
P. O. Box 637
St. Johns, AZ 85938
Via Fax 928/337-2427

By 

DAVID J. MARTIN, ATTORNEY AT LAW, P.L.L.C.
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Lakeside, AZ 85929-0808
(928) 368-8677
FAX: (928) 368-8652

February 25, 2010

State Bar of Arizona
Office of Senior Bar Counsel
4201 N. 24th Street, Suite 200
Phoenix, Arizona 85016-6288

**Re: State of Arizona vs. Joseph Roberts
Round Valley Justice Court, Case No. CR-09-0259**

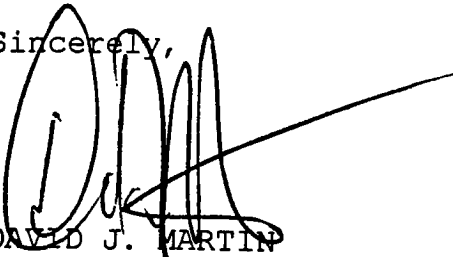
Dear Sir or Madam:

Pursuant to ER 8.3, I am hereby informing you, under the belief that you are the appropriate professional authority, of an occurrence that has raised a question regarding a possible violation of the Rules of Professional Conduct, specifically, and without limitation, ER 3.8(c), ER 4.2, and ER 5.3(c)(1).

In an effort to not exceed the proper scope of the application of the Rules of Professional Conduct, I have attached hereto a transcript of a preliminary hearing conducted in the Round Valley Justice Court, County of Apache, on February 5, 2010 in the case of State of Arizona v. Joseph Roberts, Case No. CR-09-0259. It contains the testimony of Brian Hounshell. I would direct your attention to Pages 35 through 49.

If further information is required of me, I am available at the address and phone numbers noted above.

Sincerely,



DAVID J. MARTIN

DJM:cas
cc: Joseph Roberts

Exhibit A



Direct Line: (602) 340-7354

March 2, 2010

David Joseph Martin
PO Box 808
Lakeside, AZ 85929-0808

Re: File No. 10-0341
Martin E. Brannan, Respondent

Dear Mr. Martin:

The Attorney/Consumer Assistance Program (A/CAP) acknowledges receipt of your correspondence on February 26, 2010. We are processing this matter and will reply soon.

Thank you for your patience and interest in promoting the professional responsibility of members of the State Bar of Arizona.

Sincerely,

Ariel I. Worth
Staff Bar Counsel

AIW/maj

Note: You must promptly notify this office of any change in your address, as a failure to do so will prevent us from notifying you about the status of your charge/complaint and may prevent us from taking further actions.

Exhibit B

Roberts